

Before the
Federal Communications Commission
Washington, DC 20544

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of

Application of New York Telephone)
Company d/b/a Bell Atlantic-New York,)
Bell Atlantic Communications, Inc.,)
NYNEX Long Distance Company, and) Docket No. 99-295
Bell Atlantic Global Networks, Inc. for)
Authorization to Provide In-Region)
InterLATA Services in New York)

COMMENTS OF
NETWORK ACCESS SOLUTIONS

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October 19, 1999

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SUMMARY

The Communications Act empowers the FCC to grant BA-NY's application only if the agency finds, among other things, that BA-NY provides loops and collocation on terms that are "just, reasonable, and non-discriminatory." The Commission held in denying BellSouth's application for authority to provide interLATA service in Louisiana, in turn, that the terms under which an ILEC provides loops and collocation are just, reasonable, and non-discriminatory only if those terms give "an efficient competitor a meaningful opportunity to compete."

In its comments, NAS documents that ten BA-NY policies regarding the provisioning of loops and collocation to CLECs for advanced services fail to give efficient CLECs a meaningful opportunity to compete, as follows:

- BA-NY's policy of charging CLECs a monthly recurring charge for each loop they purchase for provision of advanced services while attributing no loop costs to its own retail advanced service makes it unreasonably difficult for CLECs to compete in the advanced services market.
- Advanced service competition is harmed by BA-NY's policy of allowing its retail arm to accept an order to provide advanced service over the same loop that the BA wholesale arm had refused to provide to a CLEC on grounds that the loop is more than 18,000 feet long or is provisioned through a DLC.
- Because BA-NY charges an exorbitant price under a newly-filed tariff to remove load coils and bridged taps that interfere with advanced service transmissions on loops longer than 18,000 feet, CLECs could not reasonably provide advanced service to end users whose loops are more than 18,000 feet long even if BA-NY were willing to provide CLECs with such loops.
- Just three weeks ago, the Pennsylvania Public Utility Commission found that another BA-NY loop pricing policy makes it difficult for an efficient CLEC to compete with BA in the advanced services market. That policy, which BA-NY included for the first time in a tariff filed on August 30, 1999, requires a CLEC to pay nearly \$200 for each loop on which it requests loop makeup information.

- While BA-NY claims that it provisions 97 percent of all advanced service loops on time, this claim is flatly inconsistent with the experience of NAS and other CLECs. In NAS's case, BA-NY has delivered only about 65 percent of NAS's loops on time.
- The newly instituted BA-NY policy of preventing CLECs from utilizing the "hot cut" process in switching an existing BA-NY advanced service customer to the CLEC's advanced service makes it difficult for an efficient CLEC to compete with BA-NY in the advanced services market. Losing the ability to hot cut a loop over which advanced service already is provided adds a minimum of one week to the loop provisioning process.
- The Pennsylvania Public Utility Commission held just three weeks ago that BA-NY's policy of refusing to give CLECs real time electronic access to loop makeup information -- a loop provisioning policy that also exists in New York -- makes it unreasonably difficult for an efficient CLEC to compete in the advanced service market.
- BA makes it difficult for CLECs to compete in the advanced service market by imposing a series of charges on CLECs for collocating their electronic equipment in a BA-NY central office that BA-NY does not attribute to its own retail advanced service even though BA-NY also must place electronic equipment in its central offices in order to provide advanced services.
- BA-NY harms advanced service competition because the company does not yet provide cageless collocation as the FCC required more than 28 weeks ago.
- BA-NY harms advanced service competition by failing to deliver collocation arrangements on time notwithstanding the company's false assertion that it has delivered more than 98 percent of all collocation arrangements on time.

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Attachment: Affidavit of Roger Poole

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**COMMENTS OF
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Early this year, Network Access Solutions Corp. ("NAS") began providing advanced services (*i.e.*, high-speed data transmission services) in New York under its CuNet brand. NAS provides CuNet service by obtaining unbundled loops from Bell Atlantic-New York ("BA-NY") and then connecting those loops to DSL electronics which NAS owns and collocates inside of BA-NY central offices. At present, NAS operates collocation arrangements in 49 BA-NY central offices; by the end of the year, NAS expects to operate collocation arrangements in 73 BA-NY central offices.

DISCUSSION

The Communications Act empowers the FCC to grant BA-NY's application only if the agency finds, among other things, that BA-NY provides loops and collocation on terms that are

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"just, reasonable, and nondiscriminatory."¹ The Commission has held that the terms under which an ILEC provides loops and collocation are "just, reasonable, and nondiscriminatory" only if those terms give "an efficient competitor a meaningful opportunity to compete."²

In determining whether an ILEC's loop provisioning and collocation policies permit grant of the ILEC's application, Congress has made plain that the Commission must examine separately the impact of those policies on competition in *advanced services* without regard to the impact of those policies on *non-advanced services* competition. For example, while other provisions of the Act instruct the FCC to promote competition in telecommunications generally, Section 706 mandates specifically that the FCC "encourage the development . . . of advanced telecommunications capability" and that it do so "through measures that promote competition" in that market. The FCC recognizes that it has a special responsibility to determine whether ILEC policies are reasonable and nondiscriminatory as they affect advanced services competition. Indeed, FCC Chairman Kennard has called the agency's special responsibility to promote fast, competitive, ubiquitous and open deployment of advanced services the "most important issue on our

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1. See 47 U.S.C. § 271(d)(3) (authorizing FCC to grant such applications only where the applicant "has fully implemented the competitive checklist in subsection (c)(2)(B). Subsection (c)(2)(B) sets forth several specific obligations that the applicant must fulfill. Two of those obligations are the provision of network elements, including loops, on terms that are "just, reasonable, and nondiscriminatory", and the provision of collocation on terms that also are "just, reasonable, and nondiscriminatory").
 2. *Applic. by BellSouth Corp. for Provision of Inter LATA Services in Louisiana, Memo. Op. and Order*, 13 FCC Rcd. 20599, ¶ 87 (1998).

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agenda”³ As a result, the FCC has adopted specialized collocation rules in an effort to promote advanced services,⁴ and it has tentatively concluded that ILECs should be required to let CLECs provide advanced services over the same loops that the ILECs use to provide local exchange service.⁵

Unfortunately, BA-NY’s collocation and loop provisioning policies are discriminatory, unjust and unreasonable because they fail to give an efficient competitor a meaningful opportunity to compete. In Section I, we discuss the specific BA-NY policies that make it difficult and expensive for CLECs to access the unbundled loops that are necessary in order to provide advanced services. In Section II, we discuss the specific BA-NY policies that make it difficult and expensive for CLECs to obtain the collocation arrangements necessary to provide these services.

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3. Remarks by William E. Kennard, Chairman, Fed. Comm. Comm. prepared for delivery at the Nat. Ass’n of Telecomm. Officers and Advisors’ 19th Annual Conf., Atlanta, Ga., Sept. 17, 1999.
 4. *See Deployment of Wireline Services Offering Advanced Telecomm. Capability, First Report and Order and Further Notice of Prop. Rulemaking*, 14 FCC Rcd. 4761 at ¶¶ 18-60 (1999).
 5. *Id.*, 14 FCC Rcd. at ¶¶ 92-97.

I. BA-NY's Unlawful Loop Provisioning Policies Make It Difficult for An Efficient CLEC to Compete with BA-NY In the Advanced Services Market

A. Discriminatory Attribution of Loop Costs

The Commission already has found that BA-NY makes it unreasonably difficult for CLECs to compete with it in the advanced services market by charging CLECs a monthly recurring charge for each loop they purchase while attributing no loop costs to its own retail advanced service offerings.⁶ While BA-NY's decision to impose loop costs on its advanced service competitors but not itself might be benign if loop costs were only a modest fraction of a CLEC's total cost to provide advanced service, loop costs are *not* a modest fraction of the total cost of providing DSL service. Instead, they constitute more than 25 percent of a CLEC's total cost to provide service. An efficient CLEC does not have a "meaningful opportunity to compete" with BA-NY in the advanced services market when BA-NY's loop pricing policy adds 25 percent to the CLEC's total cost of providing advanced service that BA-NY does not attribute to its own advanced services.

6. *Deployment of Wireline Services, supra*, 14 FCC Rcd. at ¶¶ 93, 94, 96, 99 (holding that an ILEC policy of attributing no loop costs to its advanced service offering while requiring CLECs to pay the full cost of the loops they use to provide advanced services harms "consumer choice", "innovation", and "competitive deployment of advanced services"); Bell Atlantic's Tariff F.C.C. No. 1, Infospeed Digital Subscriber Line Service, Work Paper 1 at n.1 (Trans. No. 1076, Sept. 1, 1998) (stating that the only plant investment reflected in the price of Infospeed, BA's advanced service offering, are BA's "investment in SONET equipment, Central Offices Muxes and Interoffice Facilities").

B. Discriminatory Provision of Long Loops

Advanced service competition also is harmed by BA-NY's policy of allowing its retail arm to accept an order to provide advanced service over the same loop that the BA wholesale arm had refused to provide to a CLEC on grounds that the loop is more than 18,000 feet long or is provisioned through a DLC.⁷ BA has so flagrantly engaged in this discriminatory practice that one CLEC, Covad, has filed an antitrust lawsuit against BA asking for damages based in part on the injury it has suffered as a result of this practice.⁸

C. Unjust Loop Conditioning Surcharges

Because BA-NY charges an exorbitant price under a new tariff to remove load coils and bridged taps that interfere with digital transmission from loops longer than 18,000 feet, CLECs could not reasonably provide advanced service to end users whose loops are more than 18,000 feet long even if BA-NY were willing to provide CLECs with such loops. First, it is unlawful under the TELRIC pricing principle that governs loop pricing for BA-NY to levy *any* charge on CLECs to remove load coils and bridged taps since the cost of removing this equipment already is embedded

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7. Advanced service can be provided over a loop that is provisioned through a DLC if the advanced service uses ISDN or IDSL technology.
8. *Covad v. Bell Atlantic*, First Amended Complaint at 36-39, No. 1:99-CV01046 (D.D.C. filed July 8, 1999) (reporting that Covad has been injured from the rejection by BA's wholesale operation of more than 100 Covad orders for loops in excess of 18,000 feet for the provision of advanced service while BA's retail operation regularly provides advanced services to end users served by such loops).

in loop prices, as several state PUCs have found.⁹ Moreover, BA-NY's charges for load coil and bridged tap removal would be plainly excessive under TELRIC even if those costs were not already embedded in the price of loops. Under the new BA-NY tariff, the company charges the extraordinarily high price of \$1,466.85 to remove load coils from a loop that is between 18,000 and 21,000 feet (\$1,814.49 to remove coils from a loop that is more than 21,000 feet long), and it charges \$423.94 to remove a single bridged tap (\$945.39 to remove more than one bridged tap).¹⁰ With these high charges in place, it is doubtful that *any* CLEC will be willing to provide DSL service to end users served by loops having load coils or excessive bridged taps.

D. Unreasonable Surcharge to Obtain Loop Makeup Data

Just three weeks ago, the Pennsylvania PUC found that another loop pricing policy that BA initiated only recently in New York also makes it difficult for an efficient CLEC to compete with BA in the advanced services market.¹¹ That policy, which BA-NY included for the first time in a tariff filed on August 30, 1999, requires a CLEC to pay nearly \$200 for each loop on which it requests loop make-up information.¹² A CLEC cannot provide DSL service over a given loop unless

9. See, e.g., *BRF Commun. v. Ameritech*, Case No. U-11735 (Mich. Pub. Serv. Comm., Feb. 9, 1999); Pet of MFS Commun. Co. for Arbitration of Pricing of Unbundled Loops, Arbitration Award Dkt. No. 16189 at Append. A, No. 148 (Pub. Util. Comm. of Texas, Dec. 19, 1997).

10. Tariff NYPSC No. 916 at § 5.5.2 (filed Aug. 30, 1999).

11. See *Joint Pet. of Nextlink Penn., Inc., Opinion and Order* at 118 (Pa. Pub. Util. Comm. Dkt. No. P-00991648, entered Sept. 30, 1999).

12. See BA-NY NYPSC No. 916 at § 5.5.2 (filed Aug. 30, 1999) (stating that BA-NY will
(continued...))

it knows the length of that loop, the amount and location of bridged taps, the number and location of load coils, and the wire gauge of the loop. A CLEC often must request this loop make-up information for several loops in order to find one loop over which advanced service can be provided to a given end user. Requiring a CLEC to pay BA hundreds of dollars for the loop make-up information it must have in order to provide advanced service to a given end user makes it difficult to compete in the advanced services market as the Pennsylvania PUC has confirmed.

E. Dilatory Loop Provisioning

Not only does advanced service competition suffer from BA-NY's unjust, unreasonable, and discriminatory loop *pricing* policies, competition also suffers as a result of the company's unjust and unreasonable loop *provisioning* policies. While BA-NY claims that it provisions 97 percent of all advanced service loops on time,¹³ this claim is inconsistent with the experience of NAS and other CLECs. BA-NY has delivered only about 65 percent of NAS's loops on time, and many other CLECs have reported a similar experience.¹⁴ BA-NY is able to claim 97 percent on-time provisioning of advanced service loops by manipulating provisioning data in an

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12. (...continued)
provide a CLEC with loop make-up information for a given loop only upon payment of a nonrecurring "manual loop qualification" charge of \$62.13 and an "engineering query" charge of \$123.67).
13. Bell Atlantic Applic. at 20.
14. *See, e.g.,* Reply Aff'd of Michael Clancy on Behalf of Covad Comm. Co. (NYPSC Case 97-C-0271, Aug. 23, 1999) (reporting that BA-NY failed to provision 31 percent of its loop orders in a timely manner during a 12-week sample period this past summer).

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unfair way. For example, the company often will close a trouble ticket on a given loop prior to the provisioning deadline even though the trouble has not been corrected so that the company does not have to report a missed provisioning episode. Moreover, BA-NY often counts a loop as being provisioned on-time even if the loop does not work. NAS estimates that about 50 percent of the loops provisioned by BA-NY to NAS have not worked correctly on the first provisioning attempt because BA-NY does not properly cross-connect the loop to the NAS collocation cage, because BA-NY installs the loop without providing NAS with demarcation information, or because load coils or excessive bridged taps were not removed.¹⁵ BA-NY also often will change the firm order commitment ("FOC") date prior to the expiration of the initial FOC date in order to keep its on-time provisioning statistics high.¹⁶

F. Unreasonable Ban on Use of "Hot Cut" Process

A newly instituted BA-NY policy also unfairly prevents CLECs from utilizing the "hot cut" process in order to speed the unduly lengthy loop provisioning that CLECs providing advanced service experience. In the past, a CLEC was able to use the hot cut process when transferring a given end user's ISDN service to the CLEC's advanced service offering. But BA-NY

15. NAS's experience in this regard apparently is similar to the experience of other CLECs as well. See, e.g., Aff. of Thomas M. Alusio on behalf of NorthPoint Communications at ¶¶ 17-18 (NYPSC Case 97-C-0271, April 27, 1999) (reporting that BA-NY was delinquent in providing more than 50 percent of NorthPoint's March 1999 loop orders because of an improper cross connection or the absence of demarcation information).

16. See, e.g., Reply Aff. of Michael Clancy, *supra*, at ¶ 7.

amended its tariff on August 30, 1999 to add the following sentence: "ADSL/HDSL links cannot be 'hot cut'" ¹⁷ Losing the ability to hot cut a loop over which advanced service already is provided adds a minimum of one week to the loop provisioning process.

G. Unreasonable Refusal to Provide Real Time Access to Loop Makeup Data

The Pennsylvania PUC held just three weeks ago that BA's policy of refusing to give CLECs real time electronic access to loop makeup information -- a loop provisioning policy that exists in both Pennsylvania and New York -- also frustrates advanced service competition. ¹⁸ In order to provide advanced service to a given address, a CLEC needs to know the length of a loop serving that address, the amount and location of bridged taps on that loop, the number and location of load coils on the loop, and the wire gauge of the loop. Because the required information is not available electronically, CLECs must request that BA-NY provide it on a non-real-time basis. This process damages competition in advanced services by significantly delaying loop provisioning since BA-NY will not provide the CLEC with the needed data until three business days after the CLEC submits a request for this information. ¹⁹ While the Pennsylvania PUC has found that the database BA is deploying in Pennsylvania and New York for real-time access contains information

17. Tariff NYPSC 916 § 5.5.1.1(A)(2)(i) (filed Aug. 30, 1999).

18. *See Joint Pet. of Nextlink Penn., Inc., Opinion and Order, supra* at 114-16.

19. *See* Tariff NYPSC 916 5.5.1.1.(d)(2)(B) (providing that a CLEC may request the needed information by submitting an "engineering query"); *id.* § 5.5.3 (stating that BA-NY will respond to an engineering query three business days from the date that the query is submitted).

that is necessary for BA's retail service representatives to provide BA's advanced service, the agency held that this database frustrates advanced service competition since it contains almost none of the loop makeup data that is essential in order for a CLEC to order loops for the provision of DSL service.

II. BA-NY's Collocation Policies As They Affect CLECs Seeking to Provide Advanced Services Are Discriminatory, Unjust, and Unreasonable

A. Discriminatory Attribution of Collocation Costs

Not only do BA-NY's loop policies complicate the development of competition in the DSL market, its collocation policies likewise complicate DSL competition. First, BA-NY makes it difficult for CLECs to compete in the advanced services market by imposing a series of charges on a CLEC for collocating its electronic equipment in a BA-NY central office that BA-NY does not attribute to its own retail advanced service even though BA-NY also must place electronic equipment in its central offices in order to provide advanced services.²⁰ While BA-NY's decision to impose these costs on its advanced service competitors but not itself might have little negative impact on a CLEC's ability to compete with BA-NY in the advanced services market if collocation

20. See Tariff NYPSC 914 § 10.5 (setting forth charges that CLECs must pay to collocate electronic equipment in BA-NY central offices); Bell Atlantic Tariff F.C.C. No. 1, Infospeed Digital Subscriber Line Service, Description and Justification, Work Paper 1 at n. 2 (stating that the only non-investment costs that are attributed to the company's advanced services are costs that relate solely to "support functions performed by Network and Marketing, Research and Development, Procurement, and Information Systems"). Costs associated with collocation are *not* support functions performed by any of these organizations.

costs were only a small fraction of a CLEC's total cost to provide advanced service, collocation costs are *not* a minor percentage of the total cost to provide advanced service. Instead, they constitute about 10 percent of a CLEC's total cost to provide advanced service. An efficient CLEC has no "meaningful opportunity to compete" with BA-NY in the advanced service market when BA-NY's collocation policy adds 10 percent to the CLEC's total cost of providing advanced service that BA-NY does not attribute to its own advanced services.

B. Unjust Refusal to Provide the Price of Cageless Collocation

BA-NY also has thumbed its nose at one of the FCC's most important attempts to lower a CLEC's collocation costs. Nearly seven months ago, the FCC issued an order mandating that ILECs begin immediately to provide cageless physical collocation. In its order, the Commission found that both the lack of space in many central offices for other forms of physical collocation and the high cost of those other forms of collocation had hampered advanced service competition.²¹ Although BA-NY filed a skeletal cageless collocation tariff with the New York PSC eight weeks after the FCC's March 31 collocation order, that tariff failed to include the single most important provision -- the *price* of a cageless collocation arrangement.²² Instead, BA-NY indicated on the face

21. *Deployment of Wireline Services, Report and Order, supra*, 14 FCC Rcd. at ¶ 39.

22. A CLEC can calculate a minor part of the cost of a cageless collocation arrangement by examining the BA-NY tariff since the tariff makes clear that a cageless collocator, like other physical collocators, must pay the already tariffed prices for DC power, HVAC, space rental, and cable racking. But a CLEC cannot determine the *full* cost of cageless collocation since the tariff fails to include the charge that BA-NY intends to impose on a cageless collocator
(continued...)

of that tariff that it would amend the tariff at some unspecified later date to include the price of cageless collocation. More than 28 weeks after the FCC's order mandating the immediate provision of cageless collocation, however, BA-NY *still* has not amended its tariff to include the price of cageless collocation. As a result, cageless collocation still is not available in New York as a practical matter since CLECs quite understandably are reluctant to order cageless collocation without knowing the price.

C. Unreasonable Absence of On-Time Provisioning of Collocation Arrangements

BA-NY's assertion that it has delivered more than 98 percent of all collocation arrangements on-time²³ also misrepresents the facts. While BA-NY delivers collocation cages to NAS within the time-frames set forth in its collocation tariff, these cages often cannot be used until several weeks *after* their delivery because of delays in the assignment of the special billing number ("SBN") and carrier facility assignment ("CFA") information. BA-NY will not accept a CLEC's orders for advanced service loops from a central office in which the CLEC is newly collocated until *after* BA-NY assigns that CLEC a central office-specific SBN and until *after* it provides the CLEC with CFA information. Often, BA-NY does not assign the SBN or provide the CFA until several weeks *after* turning over a collocation arrangement.

22. (...continued)
in order to protect BA-NY's own equipment.

23. Bell Atlantic Applic. at 14, LaCouture/Troy Decl. at ¶ 33.

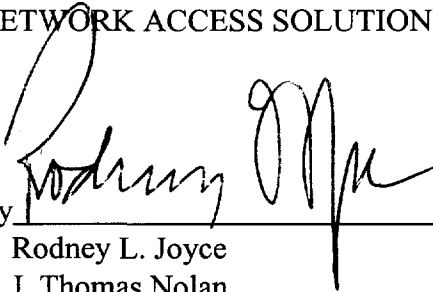
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CONCLUSION

Section 271(d)(3) of the Act prohibits the Commission from granting the pending application by Bell Atlantic-New York because the applicant does not provide CLECs with loops and collocation for provision of advanced services on reasonable and nondiscriminatory terms.

Respectfully submitted,

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October 19, 1999

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I hereby certify that on October 19, 1999, a copy of the foregoing "Comments of Network Access Solutions, Inc." was served on each of the following:

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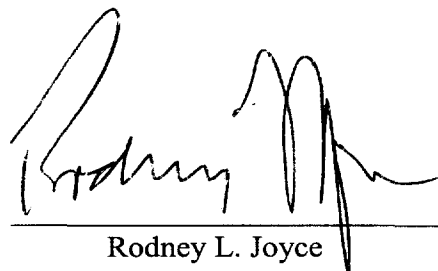
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AFFIDAVIT

My name is Roger Poole. I am Director of Program Management for Network Access Solutions Corporation ("NAS"). NAS is a CLEC that provides telecommunications services in New York and elsewhere using digital subscriber line technology.

I hereby attest that each statement of fact in NAS's October 19, 1999 comments in this docket concerning our company's experience with respect to the receipt of collocation and unbundled loops is true to the best of my knowledge, information and belief.



ROGER POOLE

COMMONWEALTH OF VIRGINIA:

Subscribed and sworn to before me, a notary public, this 19 day of October, 1999.



NOTARY PUBLIC

My Commission Expires:

9-30-2001

